SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....,

BAKERY SALES DRIVERS LOCAL UNION NO. 344 (A. F. of L.), AUTO TRUCK DRIVERS JOINT COUNCIL NO. 50 (A. F. of L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA and G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, a Corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 236 Wis. 367, and is appended hereto as Exhibit A.

JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this court is section 237, as amended by the Act of February 13, 1935, U. S. C. A., Section 344-b, Title 28.

As seen in the jurisdictional statement in the foregoing

petition, the constitutional objections to the legislation upon which the present injunction is based and to the injunction itself were raised and argued before the Circuit Court of Milwaukee County and the Supreme Court of the State of Wisconsin, the court of last resort for all causes in the state. The constitutional objections were discussed and passed upon by the Circuit Court for Milwaukee County and the judgment of that court was affirmed by the Supreme Court of the State of Wisconsin without opinion by virtue of the equal division of the judges of that court.

STATEMENT OF THE CASE.

A summary statement of the case appears in the petition for writ of certiorari, which, in the interest of brevity, is incorporated herein by reference.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Wisconsin, in affirming the judgment of the Circuit Court for Milwaukee County, erred in the following respects:

1. In sustaining the judgment of the Circuit Court providing that your petitioners be enjoined and restrained

> "(1) From adopting means and engaging in conduct intended and reasonably calculated to coerce and intimidate plaintiff's employes while performing their usual and ordinary services for the plaintiff.
>
> "(2) From following plaintiff's employes and delivery trucks while said trucks are being used to deliver bakery products to plaintiff's customers.
>
> "(3) From inciting or attempting to persuade persons not to deal with the plaintiff or the plaintiff's employes or with retail dealers offering plaintiff's products for sale.
>
> "(4) From otherwise intentionally molesting, injuring or interfering with the plaintiff in its business" (R. 32, 33).

2. In confirming the findings of the Circuit Court for Milwaukee County (conclusions of law):

> "First: That the acts of the defendants constitute unfair labor practices within the meaning of the term 'unfair labor practice,' as defined by Section 111.06 of the Statutes of the State of Wisconsin.
>
> "Second: That no labor dispute exists between the plaintiff and defendants as defined in Section 111.04 of the Statutes of the State of Wisconsin.
>
> "Third: That the provisions of Chapter 111 of the Statutes of the State of Wisconsin are valid and constitutional enactments and do not violate the constitutional guaranty of freedom of speech" (R. 30).

3. In sustaining the following finding of fact made by the Circuit Court for Milwaukee County, Wisconsin, which

is unsupported by the record and which constitutes a conclusion of law on the part of such court that peaceful picketing and boycotting activities and the exerting of "economic pressure" are unlawfully coercive and intimidatory:

> "Seventh: That the defendants herein have, in concert with others as well as individually, contrary to the provisions of Section 111.06, Wisconsin Statutes, coerced and intimidated the employes of the plaintiff in the enjoyment of their legal rights, including those guaranteed in Section 111.04, Wisconsin Statutes, and have, by such coercion and intimidation, injured said employes in their property by such means; that the defendants have, individually and in concert with others, by exerting economic pressure upon plaintiff's employes as well as upon customers of the plaintiff solicited by such employes, intended to coerce, intimidate and induce the plaintiff employer to interfere with its employes in the enjoyment of their legal rights, including those guaranteed in Section 111.04, Wisconsin Statutes, and have thereby injured the plaintiff in its trade and business for the purpose of compelling the plaintiff to influence and coerce its said employes to designate the defendants Bakery Sales Drivers Local Union No. 344 (A. F. of L.), or Auto Truck Drivers Joint Council No. 50 (A. F. of L.), as a collective bargaining representative for such employes. That the defendants, by their conduct as individuals, as well as in concert with others in this regard, have intended to and have in fact injured the plaintiff in its trade and business. That the said defendants, individually and in concert with others, have further hindered and prevented, by the coercion of the plaintiff's employes, the pursuit of the lawful work and employment of said employes, and have further accomplished a substantial diminution of sales of the products manufactured by the plaintiff, which said employes sought to sell and deliver to customers upon their respective routes" (R. 26, 27).

ARGUMENT.

Inasmuch as the Wisconsin Supreme Court wrote no opinion specifically answering the contentions made and the errors assigned by these petitioners we must look to the decision, findings of fact, and conclusions of law of the Circuit Court for the purpose of ascertaining the basis for the issuance of the injunction, the reasons therefor, and the treatment of the constitutional question involved.

I.

The Lower Court's Decision Is Based Upon the Purported Applicability of the Provisions of Section 111.06 (2) (e), 111.02 (8), Wis. Stats. 1939, and the Case of Hotel and Restaurant Employees et al. v. Wisconsin Employment Relations Board Now Before This Court for Review. Such Sections of the Statute are Clearly Unconstitutional.

Examination of the lower court's decision (R. 16-23) discloses that the judgment is based upon the purported application of certain provisions of Chapter 111, Laws of 1939. (It was argued by the Union in both the Circuit Court and the Wisconsin Supreme Court that any claimed violations of Chapter 111 had to be put to the Wisconsin Employment Relations Board, charged with the duty of administering the provisions of Chapter 111. This argument was rejected by the Circuit Court. Inasmuch as this point involves a question of local law only, we do not pursue it any further in the instant proceedings.)

The Circuit Court found that there was no labor dispute as that term is defined in Section 111.02 (8) Wis. Stats. 1939. That section reads as follows:

> "111.02 (8). The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concern-

ing the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

The Circuit Court further found that the stipulated peaceful activities of the petitioners were in violation of the following provisions of Section 111.06, Wis. Stats. 1939:

"111.06 (2). It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

* * * * * * *

"(e) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The Circuit Court found that the activities of the union "definitely offends against the provisions of Subsection (e) of Section 111.06, paragraph (2), for it calls for a co-operation of a number of members of the union to engage in, promote or induce picketing, boycotting, or other overt act. In the language of the statute, this conduct is declared to be an unfair labor practice. The right of the state by statute to regulate such concert of action as here invoked is declared in the opinion of the Court in **Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wisconsin Employment Relations Board et al.** (November, 1940), and is the answer to the argument that Section 111.06 violates the constitutional guaranty of freedom of speech" (R. 22).

The Court further held, in passing upon the challenge to the constitutionality of those statutes, as follows:

> "I believe that all of the matters which are urged by the defendants, challenging the constitutionality of the statutes in question, are decided in the case of **Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wisconsin Employment Relations Board et al.** * * *" (R. 23).

(The case aforereferred to by the lower court is now before this Court for review, being case No. 124 on the October, 1941, calendar, certiorari granted October 13, 1941.)

Pertinent among the findings of fact relied on by the Court to support the applicability of the statutes and the Hotel and Restaurant Employees case are the following:

Finding numbered five that a majority of the company's salesmen have refused to designate the petitioning unions as their collective bargaining representatives (R. 25).

Finding numbered 7 that the activities of the petitioning unions were coercive, intimidatory, and have injured the

employees of the company and the company because of "economic pressure" exerted upon the employees and upon the customers of the company (R. 26, 27).

Finding numbered eight that the petitioners have cooperated together in engaging in, promoting and inducing the boycotting of the bakery products manufactured for sale by the plaintiff (company) and sold by employees of the company, "all contrary to the provisions of Section 111.06 (2), (e), Wisconsin Statutes," requiring a majority vote of employees (R. 27).

Finding nine, that the employees of the company were followed, and that when such employees stopped to make deliveries at retail dealers' places of business and requested and encouraged the customers to discontinue purchasing bakery products, and that such members picketed the trucks and the places of business, carrying signs and placards stating: "This Carpenter Baking Co. employe is not a member of Bakery Sales Drivers Union Local 344. Please do not patronize" (R. 27, 28).

Finding numbered twelve, that none of the petitioners named is an employee of the company (R. 28).

Finding numbered thirteen, that the conduct has resulted in the loss of patronage to the company (R. 29).

Examination of the conclusions of law, hereinbefore set forth, further demonstrates that the provisions of Section 111.06 were held to sustain the issuance of an injunction, which restrained the petitioners, among other things, from inciting or attempting to persuade persons not to deal with the company or the company's employees or with retail dealers offering the company's products for sale.

The injunction in this case, therefore, is bottomed upon the purported provisions of Section 111.06 of the Wis-

consin Statutes, particularly Sections 111.06 (2) (e) and 111.02 (8) thereof.

Argument on both of these statutes has been recently presented to this Court in the case of **Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wisconsin Employment Relations Board et al.**, 236 Wis. 329, 294 N. W. 632. The decision of the Wisconsin Supreme Court in that case, which is now under review by this Court, was relied upon by the Circuit Court as sustaining its conclusion that the provisions of the statute were constitutional and supported the injunction issued. Inasmuch as extensive argument was made in the aforementioned case concerning the constitutionality of Section 111.06 (2) (e) and the companion Section 111.02 (8), we will not make any further argument thereon other than to point out that under the decisions of this Court in the cases of **Thornhill v. Alabama**, supra; **Carlson v. California**, supra; **American Federation of Labor v. Swing**, supra, and **Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.**, supra, such statutes are clearly unconstitutional and void.

There then remains for discussion only the question of whether or not the injunction herein, under the facts of this case, can be supported against the claim that such injunction deprives these petitioners of rights, privileges, or immunities under the Constitution of the United States. This, in turn, requires an examination of the facts.

II.

The Undisputed Stipulated Facts of This Case Demonstrate Conclusively That the Injunction Cannot Be Sustained Under Any Accepted Theory of Law.

The case was tried in the main upon stipulated set of facts (R. 35-54). Pertinent herein are the following paragraphs in the stipulation:

"1. Since 1933, the defendant labor union, Bakery Sales Drivers Local Union No. 344, and its predecessor, Local No. 347, have attempted to organize the bakery sales drivers of the Carpenter Baking Company, the plaintiff in this action.

* * * * * * *

"4. In September of 1938, the Bakery Sales Drivers Local Union No. 344 had several meetings with the sales drivers of the Carpenter Baking Company for the purpose of organizing them.

* * * * * * *

"17. Since the plant reopened on April 4, 1939, Local 344 has continued its efforts to unionize the bakery sales drivers, and prior to August 12, 1940, it solicited individually such sales drivers on numerous occasions, and at least two meetings were held of the sales drivers, which meetings were called by Local 344. * * *

"18. It is agreed that on June 8, 1939, Exhibit G was forwarded by Joint Council No. 50 to all of the Carpenter Baking Company sales drivers; that on May 14, 1940, Exhibit H[2] was forwarded to Mr. Jack Miller, president of the Brotherhood of Carpenter Bakery Sales Drivers, and a similar letter was forwarded to each sales driver employed by the Carpenter Company; that on June 27, 1940, Exhibit I[3] was forwarded to Mr. Jack Miller, president of the Brotherhood of Carpenter Bakery Sales Drivers, and a similar letter was forwarded to each sales driver employed by the Carpenter Baking Company.

"19. It is further agreed that on May 16, 1940, a meeting of the Carpenter Baking Company sales drivers was held at the Maryland Hotel, at which time Mr. Johnson addressed such drivers, explaining the benefits of membership in Local 344 and soliciting the membership of those present, and on July 2, 1940, a similar meeting was held at the Atlantic Hotel, at

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2, 3 These exhibits are not set forth in full in the printed case. The letters referred to are requests made by the union to the employees that they become members of such organization.

which Mr. Johnson again made a similar explanation and again solicited the membership of the sales drivers present.

"At the meeting held on May 16, 1940, Mr. Johnson, in addressing the meeting, stated that there were three Carpenter Baking Company sales drivers that were members of the union. When his statement was challenged, a vote was taken, and the secret ballots established that three sales drivers were members of Local 344. After further discussion another vote was taken to determine how many of the employes present would favor having all the Carpenter Baking Company sales drivers affiliated with Local 344, and the vote was eight to eight, there being sixteen employes voting. It is also agreed that such sixteen does not constitute the entire number of sales drivers; that the Carpenter Baking Company had at that time in its employ twenty-eight bakery sales drivers. The three sales drivers who were members of Local 344 on May 16, 1940, had become such members between April 4, 1939, and May 16, 1940.

"20. The minutes of a meeting of Local 344 held on April 9, 1940, contained the following:

> " 'Motion made and seconded to grant the Executive Board the authority to advertise those Carpenter Sales drivers who were not members of Local 344 in order to get them to join. Motion carried 100 per cent.'

"The minutes of a special meeting called and held on July 23, 1940, contained the following:

> " 'Purpose: To vote on the question of whether to assess each member $1.00 per month, starting with August dues, for the duration of the controversy with the M. Carpenter Baking Company sales drivers.
>
> " 'Motion made and seconded to levy a $1.00 assessment per month, per member, starting with August dues, for the duration of our controversy with the M. Carpenter Baking Company sales drivers. Motion carried; 116 in favor, 25 opposed.'

"21. On August 12, 1940, at about 4:30 a. m., Local 344, under the direction of its business manager Elmer Johnson, commenced the following activities:

"The union secured various individuals to follow the Carpenter Bakery delivery trucks on their routes throughout the City of Milwaukee and vicinity. Some of such individuals were paid for their services in following such trucks. The procedure in following the trucks was substantially as follows:

"Automobiles were used by the union, and in each automobile there were two men, one wearing a canvas sign suspended from the shoulders and visible from both the front and the rear, which sign contained the following words:

> " 'This Carpenter Baking Co. employe is not a member of Bakery Sales Drivers Union Local 344. Please do not patronize.'

"One of said canvas signs is marked 'Exhibit J' and is shown in the picture marked 'Exhibit K.'

"Such automobiles followed the bakery delivery trucks from one customer's place to another, and, as the delivery truck would stop to make a delivery to a customer, the union representative wearing the sign walked back and forth alongside of the truck and, after the first three or four days, such sign bearer walked back and forth in front of the customers' places of business while the Carpenter Baking Company employe was servicing such customers, regardless of whether the truck was stopped in the immediate vicinity of the customer's place of business.

"The other union representative entered the customers' places of business and informed such customers that the bakery sales drivers were not members of Local 344, and requested such customers to co-operate with the union by refusing to purchase or by limiting their purchases of bakery goods offered for sale by such Carpenter Baking Company employes.

"Prior to August 12, 1940, the Carpenter Baking Company merely supplied a single sales driver for

each truck. Several days after the commencement of the union activities on August 12, 1940, the Carpenter Baking Company supplied an additional man to accompany each sales driver that was followed by union representatives, the helper in most instances remaining in the truck while the sales driver serviced the customer.

"On occasions there would be more than one union automobile in the vicinity of a customer's place of business while being serviced by a Carpenter Baking Company employe. This resulted from the fact that Mr. Johnson, who was in charge of activities for the union, would on occasions drive his automobile and stop in the vicinity of customers' places of business while deliveries were being made.

"It is also agreed that on occasions the Carpenter Baking Company sales drivers used regular automobiles in making deliveries rather than the usual delivery trucks. This was done for the purpose of evading the union representatives, and a private automobile and a truck may have been used on the same route at the same time.

"It is further agreed that the number of union automobiles that have followed bakery delivery trucks from August 12th to the date hereof has varied from two to six.

"It is agreed that since the union activities commenced on August 12, 1940, the Carpenter Baking Company has sustained a substantial loss of business, which loss is estimated by the Carpenter Baking Company in excess of 15 per cent of its total volume of business; and it is further agreed that a number of customers have ceased to handle Carpenter Baking Company products since such activities commenced on August 12, 1940, and that other customers have limited the purchases made by them.

"24. The plaintiff objects to the relevancy of the statements contained in this paragraph, but concedes the accuracy of such statements.

"Local 344, or its predecessor, Local 347, commenced intensive organization activities of the bakery sales drivers in the City of Milwaukee in the year 1933. On November 1, 1934, it secured its first written all-union contracts with two major bakeries in the Milwaukee area. In the spring of 1938, it succeeded in organizing and securing written all-union agreements from all of the major bakeries in the Milwaukee area with the exception of the Carpenter Baking Company.

"In some of the major bakeries, other than the Carpenter Baking Company, some sales drivers did some work on Sunday in addition to the work performed by them on the other six days of the week, and that there was no definite hour set for sales drivers to go off the street, and some such drivers continued work until 5 or 6 o'clock in the evening. Some major bakeries, other than the Carpenter Baking Company, did not provide vacations with pay for sales drivers. In some major bakeries, other than the Carpenter Baking Company, for a period of time there was no guaranteed or base wage provided, the sales drivers working on a straight 10 per cent commission basis.

"The signed contracts with the major bakeries, other than the Carpenter Baking Company, contain provision for a six-day week for sales drivers, no work to be performed on Sunday. There is also a provision in such contracts providing that sales drivers employed by these bakeries must be off the street with their trucks not later than 2:15 p. m.

"Such contracts provide for vacations with pay ranging from one week to two weeks, depending on length of service, and provide a guaranteed or base rate of $32.00 per week, plus 10 per cent commission on sales exceeding $270.00 per week. (The first union contracts provided a base rate of $27.00 per week plus commissions.) There are other benefits for the sales drivers provided in such contracts.

"It is agreed that the Carpenter Baking Company has for many years given vacations with pay to its

sales drivers, and that for many years such bakery sales drivers have not made deliveries on Sunday, and that said company attempts to have all of its employes off the street at 2:30 p. m.; the last contract with the Brotherhood provided that such employes should be off the street by 2:30 p. m.

"During the past seven years sales drivers employed by the Carpenter Baking Company have been paid a guaranteed salary, plus commissions on sales made, which guarantees have varied from $27.00 to $32.50 per week. At the present time the guarantee is $32.50 per week on sales up to $200.00 per week, and on sales in excess of $200.00 per week commissions are paid upon a graduated scale, depending upon the particular territory that each sales driver serves.

"25. The defendants propose to continue the activities that they have followed since August 12, 1940.

"26. **There has been no violence since the commencement of the activities on August 12, 1940.** The nature of the activities carried on is such that the public officers (police officers) would not have any jurisdiction, and such officers are powerless to afford the plaintiff any remedy in connection with such activities; for that reason there has been no occasion or necessity for plaintiff to give such officers any notice of the proceedings pending in this court. (Emphasis ours.)

"27. Defendants concede that the activities presently carried on by them are for the purpose of persuading people to desist and refrain from purchasing bakery products offered for sale by Carpenter Baking Company sales drivers who are not members of Local 344.

"Defendants also concede they have had information that the compensation of Carpenter Baking Company sales drivers is in part dependent upon commissions based upon the amount of sales made by such sales drivers, and that defendants have sought to reduce the sales in order to reduce the earnings of

such sales drivers and thereby apply economic pressure upon the sales drivers to obtain the union membership of such sales drivers.

"28. Defendants claim that at the present time Local 344 has eight members that are in the employ of the Carpenter Baking Company as sales drivers, but the plaintiff has no knowledge concerning the number, and, therefore, does not concede the same."

In addition to the above stipulated facts, some testimony was taken relating to the activities of the pickets. This testimony does not in any way vary nor add to the stipulated facts above set forth, other than the testimony of one driver for the company, who said the drivers would make efforts to elude the automobile driven by union men, which followed the company's trucks for the purpose of picketing at the time a delivery was made (R. 79, 80).

It was on this record that the Circuit Court for Milwaukee County made the findings of fact already referred to herein that the activities of the petitioners have resulted in coercion and intimidation of the employees, have been for the purpose of coercing, intimidating and inducing the company to interfere with the legal rights of its employees, and have hindered and prevented by coercion of the employees the pursuit of lawful work in the employment of the employer.

It was also on these undisputed facts that the judgment appealed from was entered.

A. The trial court's designation of conduct as "coercive" or "intimidating" does not and cannot justify restraint of what this Court has declared to be the exercise of right of free speech.

It is undisputed in the record that ~~the defendant~~ Local 344 represents eight of the eligible twenty-seven em-

ployees of the company (R. 73); that for many years it has sought to persuade the remaining employees to join the organization and to secure a contract with the Carpenter Baking Company so that wages, hours and working conditions in the bakery industry can be standardized, to the mutual advantage of employer and employee (R. 35).

It is undisputed also that, since Augst 12, 1940, **all of the activities of the ~~defendants~~ have been directed solely to the employees of the ~~plaintiff~~ for the purpose of securing their membership in the ~~defendant~~ labor organization, and for the purpose of advising the public of their nonunion status.** The picketing and bannering which the Company complained of in the instant case were directed solely to such employees, not only by the express language of the signs, but also by information given to the public generally. There is no indication any place in the record that the activities were otherwise.

The only activities which the Company complained of and which were before the Court, other than the following of the company's delivy trucks, consisted of the peaceful exhibiting of placards to advise the public that certain employees were not members of the petitioning labor organization, and requesting that persons who were solicited to purchase products delivered by the nonunion employees, whether for the purposes of resale or for the purposes of consumption, do not patronize such employees or purchase such products from such nonunion employees. (On the temporary hearing for injunction, and subsequent thereto, it was agreed that the "please do not patronize" clause would be eliminated from the placards, and it has not been used since.)

There was not contained in any of these activities any misrepresentation of any sort. None of the activities were accompanied by violence of any kind. The immediate

objective of the union was to secure the membership of the employees. Naturally and normally it was felt that after securing the membership of the employees the union and the company could then lawfully negotiate a collective bargaining agreement similar to that then prevailing in the industry.

The trial court in its decision (R. 22) stated that the desire or plan of the union to exert "economic pressure" upon the salesmen to the end that they become members of the union definitely offended against the provisions of Section 111.06 (2) (l).

In the instant case the activities complained of and enjoined by the order of the Court fall clearly within the scope of conduct which the United States Supreme Court has held to be free from restraint in the Thornhill, Carlson and Swing cases. The injunction clearly violates the constitutional rights of these defendants.

It will undoubtedly be argued by the respondents that whatever may be the law as set out in the **Thornhill, Carlson** and **Swing** cases, such cases are inapplicable to the facts in the instant case because of the findings of the Court that the peaceful conduct constituted "coercion" or "intimidation."

The circumstance that the trial court has in its findings of fact described such conduct as being "coercive" or "intimidatory" does not alter the situation one bit. Conduct which is described and characterized by the United States Supreme Court as the exercise of the right of free speech cannot be characterized by lower courts as being **unlawfully** coercive or **unlawfully** intimidatory. The effect of such activities may be "coercive" or "intimidatory," but only in the sense that the person who is referred to in such activities may eventually yield to the peaceful and truthful persuasion, although he had formerly deter-

mined not to. Such peaceful activities, however, cannot be defined in the terms of **results**, but must be defined in the terms of **what it is.**

The lower court could not, therefore, restrain the truthful and peaceful exercise of the right of free speech on the ground that it was at the same time "coercive" or "intimidatory."

The conduct engaged in in the instant case might be termed "pressure." It might be coercive or intimidatory in so far as its **effect** is concerned. That, however, does not remove it from the constitutional protection assured to peaceful conduct in the **Thornhill, Carlson** and **Swing** cases. The effect must be distinguished from the means.

In Volume IV of Restatement of the Law of Torts, paragraph 778, it is very carefully pointed out that there is a distinction between persuasion and coercion, and that such distinction was due "* * * not to a difference in the **purpose or result** of the employees' conduct, in so far as 'A' is concerned, but rather to the difference in the **means** by which the third persons are influenced to act." (Emphasis ours.)

In reviewing the findings of fact and the conclusions of law in the instant case it is manifest that what the lower court has done is look upon the **result** of the conduct complained of in so far as the employees, the employer and the third persons are concerned, instead of looking upon the **means** adopted by the labor organization. This approach is rejected by the decisions of this Court and the Restatement of Law. If in accordance with the decisions we look upon the **means** rather than the **result**, it must necessarily follow that the conduct complained of in this case is not subject to restraintby virtue of any provisions of the Wisconsin statutes, or by virtue of any general equity power of the Wisconsin courts.

To speak of peaceful activities as constituting coercion or intimidation is to fall prey to the "tyranny of labels," which Justice Cardozo referred to in **Palko v. State of Connecticut**, 302 U. S. 391, 82 L. Ed. 288.

Inasmuch as in the instant case there is a situation involving competition between labor organizations for membership among the employees in the respondent company the decision in the case of **Nann v. Raimist**, 255 N. Y. 307, 174 N. E. 690, written by the late Justice Cardozo, then Chief Justice of the New York Court of Appeals, is directly pertinent. Meeting the complaint in that case that one labor organization was inaccurate in its statement of the facts of the controversy, the Court stated:

> "There is argument and entreaty, often colored and hectic, involving perhaps at times the deduction from meager facts of debatable conclusions. There is no such malevolent distortion as to justify repression. Courts have enough to do in restraining physical disorder without busying themselves with logomachies in which the embattled words are the expression of the opinion of the writer or the speaker. If there is redress for such a wrong, unassociated with wrongful action, the remedy is not in equity * * *"

Referring to the sweeping terms of the injunction, the Court stated:

> "The other prohibitions are an impairment of the defendant's right to win converts over to its fold by recourse to peaceable persuasion, and to induce them by like methods to renounce allegiance to its rival. Recent decisions of this Court have established that fundamental right too emphatically and forcefully to make further indication needful."

Also pertinent herein is the statement of the Oregon Court in the case of **George B. Wallace Company v. International Association**, 115 Or. 652, 63 Pac. (2) 1090, holding:

"The doctrine that picketing is necessarily a species of coercion and intimidation, is dogma long discarded."

The opinion of the court below is predicated in some measure on the belief that the activities of the organization are really directed against the employer, particularly since such activities must necessarily result in loss to the employer. The Court, therefore, restrained the otherwise legitimate activity of the petitioners because of such resulting injury, this apparently on the assumption that the employer must be made immune from the results of advertising the nonunion status of the employees. This argument has best been answered by the statement in the **Thornhill** case:

"It may be that effective exercise of the means of advancing public knowledge may persuade some of these reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society. **But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.**

* * * * * * *

"We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448." (Emphasis ours.)

It becomes apparent from a reading of the findings of fact that in so far as it is claimed that the conduct of the petitioners is coercive, intimidatory, or for improper purposes, such findings are pure conclusions based upon

the result of the activities, rather than upon the means and purposes of the activities. No place in the record is there any evidence of any kind that would sustain a finding of coercion, intimidation, or intent to compel the employer to violate any of the laws of Wisconsin.

The injunction, therefore, directed as it is to the peaceful and legitimate activities of the ~~defendants~~ petitioners to attain proper and lawful objectives, is in clear violation of the constitutional rights of the petitioners.

B. **The record and findings of fact show conclusively that the peaceful, lawful activities of the petitioners are directed to the lawful purpose of advertising the nonunion status of the employees and seeking to enlist them into union membership. This is a dispute between employees or competing labor unions.**

Anticipating the attempt to distinguish the instant case from the **Thornhill, Carlson** and **Swing** cases by insisting that the petitioners' activities were directed to an illegal purpose, to wit, seeking to compel the company to interfere with the rights of its employees, we examine the decision and findings of the lawer court.

(1) *The Decision is based upon the Hotel and Restaurant Employees case and the applicability of Sec. 111.06 (2) (e), Wisconsin Stats. 1939.*

We have already pointed out that the court below proceeded upon entirely erroneous theories of law, and that the judgment herein, as well as many purported findings of fact and conclusions of law, are not based upon or responsive to actual facts, but are based upon the economic theory and predelictions of the court below. For example, the Court in its decision refers to the property right of delivery salesmen to peacefully solicit the customers

and deliver bakery products to them. There is no challenge here of the right of these salesmen to engage in such activities. There is only the claim here of the right of the petitioners to advise the public that such salesmen engaged in such activities are nonunion men and are competing with union men.

This situation is directly similar to that which was before the Wisconsin Court in the case of **Senn v. Tile Layers' Protective Association**, 222 Wis. 383, 268 N. W. 270. In that case it was very properly pointed out that the person picketed was free to perform all the work he could get in whatever manner he wishes to perform it; that he could work long hours, and bid for contracts at a low figure, based upon low wages for himself and on such long hours. The Court stated:

> "In the judgment of respondents, his conduct in this respect affects their opportunity of maintaining a standard of better wages, regulated hours, and improved working conditions, and the collision of the two sets of rights, the one in appellant, and the other in respondents, created a labor dispute within the definition of the code (Sections 103.51 to 103.63, Statutes). If the trade turns from one to the other as the result of the dispute the injury is incidental and injuria absque damno."

In the course of the decision of the United States Supreme Court affirming the **Senn** case, reported in 301 U. S. 478, Justice Brandeis affirmed the above language of the Wisconsin Court, stating:

> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving it publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by

> the constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped for job is not property guaranteed by the constitution, and the diversion of it to a competitor is not an invasion of a constitutional right."

So much, then, for the solicitude of the court below for the nonunion employees at the cost of prohibiting the constitutional right of the union employees.

The gist of the opinion of the court below can be found in the statement of that Court that the plan of the union "definitely offended against the provisions of subsection (e) of section 111.06 (2), for it calls for a co-operation of a number of members of the union to engage in, promote or induce picketing, boycotting or other overt acts."

The Court then goes on to state that, inasmuch as this statute was upheld in the **Hotel & Restaurant Employees** case, holding such statute to be constitutional, and inasmuch as the **Hotel & Restaurant Employees** case declared the public policy of the Legislature to be constitutional, "the parties to this action are presently bound to observe and abide by the regulations imposed upon their conduct in their relations to each other."

The decision of the court below, then, is very obviously and unquestionably based upon interpretation of the decision of the Wisconsin Court in the **Hotel & Restaurant Employees** case now before this Court for review. Extensive argument having only recently been made in such case, we do not repeat such argument herein other than to point out that there is not any claim of violence in this case. It has been expressly stipulated that there has been no violence (R. 53).

(2) *The decision of the lower court recognizes that the activities are directed to persuading the employees to join the petitioning union.*

In the Court's decision there is an express recognition of the purpose and object of the activities of the petitioning union. The Court stated (C. 22):

> "We are confronted in this case with actions that are admittedly part of a design or plan to exert 'economic pressure' upon these salesmen and to reduce their earning capacity, **to the end that they will become members of the union, which they have declined to join at various meetings** called for the purpose of meeting with union organizers and the taking of ballots expressing their choice." (Emphasis ours.)

This statement of the Court is fully sustained by all the evidence in the case. The Court's reference, therefore, in other portions of its decision to the so-called "unlawful purposes" of the petitioners is pure unsupported conclusion.

(3) *The findings of fact expressly affirm that the purpose and object of the lawful activities is to organize the bakery sales drivers by direct appeal to them and the truthful advertising of their nonunion status.*

It is to be noted that the first finding of fact made by the court below is as follows:

> "I approve and find as facts each and all of the facts set forth in that certain written stipulation entered into between the parties during the course of the trial."

Reference to that stipulation shows that, in so far as this branch of the argument is concerned, the Court has approved and found the following facts:

Since 1933 the petitioning Local No. 344 has "attempted

to organize the **bakery sales drivers** of the Carpenter Baking Company * * *" (R. 35, Stipulation of Facts, para. 1).

In September, 1938, Local No. 344 had several meetings with the **sales drivers** of the company "for the purpose of organizing them" (R. 34, Stip., para. 4).

On January 13 and January 18, 1939, direct appeals were made by Local No. 344 to the **sales drivers** of the plaintiff company for the purpose of inducing them to join Local 344 (R. 40, 41, Stip., para. 11).

Since April 4, 1939, Local 344 "has continued its efforts to unionize the **bakery sales drivers**, and prior to August 12, 1940, it solicited individually such sales drivers on numerous occasions, and at least two meetings were held of the **sales drivers**, which meetings were called by Local 344" (R. 43, Stip., para. 17).

Letters were sent on June 6, 1939, on May 14, 1940, and on June 27, 1940, inviting the **sales drivers** to attend meetings conducted by the petitioners (R. 44, Stip., para. 18).

Meetings were held on May 16, 1940, and July 2, 1940, by Local 344, at which **sales drivers** of the plaintiff attended, and at which the benefits of membership in Local 344 were explained, and the **sales drivers** in attendance were invited to join such organization (R. 44, 45; Stip. para. 19).

On April 9, 1940, and again on July 23, 1940, the union took formal action with respect to advertising the status of the Carpenter **sales drivers** who were not members of Local 344 in order to get them to join, and for the purpose of raising funds "for the duration of the controversy with the M. Carpenter Baking Company **sales drivers**" (R. 45, 46, 140; Stip. 20).

The activities presently carried on are for the purpose of persuading people to refrain from purchasing bakery

products offered for sale by the "Carpenter Baking Company **sales drivers who were not members of Local 344.**" The petitioners have applied enonomic pressure for the purpose of persuading such sales drivers to become members of the union (R. 53; Stip. para. 27).

In addition to the above there is the uncontradicted testimony in the record that the activities were directed solely to the drivers, as well as the uncontradicted testimony that those employees of the company who were members of the union were not picketed (R. 27).

The trial court in its decision referred to the activity as being directed "* * * to the end that they (the sales drivers) will become members of the union * * *" (R. 22).

In view of these findings of fact made by the lower court, it must be obvious that any purported finding contained in paragraphs 7 and 13 of the findings of fact, that such activities were directed at the company or that such activities were for the purpose of coercing the company to violate any laws of the state, are pure conclusions, unsupported by and contrary to fact, and are attributable only to the lower court's having confused the results of such activities with the purpose and objective of such activities and the means employed.

Certainly the express findings of fact made by the Court must be deemed to be controlling if there is any question whatsoever.

(4) *The remaining findings are hopelessly confused and are chiefly conclusions, and unwarranted and unsupported inferences. They do no support any judgment alleged to be based upon a finding that the activities are for an illegal purpose.*

The seventh finding of fact is in truth a conclusion of law (R. 26). The first clause therein relates to coercion and

intimidation without setting forth the specific acts which presumably constitute such coercion and intimidation.

Since the record indicates that the union engaged only in peaceful picketing, this finding is tantamount to a finding that the peaceful picketing constituted coercion and intimidation.

As we have already seen, peaceful and truthful picketing is an exercise of free speech, and a constitutional guarantee thereof cannot be evaded by the process of labeling such conduct by the epithets "coercive" or "intimidatory."

The second clause in such finding refers to the petitioners "exerting economic pressure upon plaintiff's employees, as well as upon customers of the plaintiff solicited by such employees," and goes on to state that such pressure was intended to coerce, intimidate and induce the employer to interfere with the employees in the exercise of their rights, and to coerce its employees to designate the union as the collective bargaining representative.

Here again we have the Court confusing the **result** of conduct with the **means** employed and the purpose. No place in the record is there any intimation that the conduct was directed to any purpose other than to secure the membership of the employees. There is no place in the record a scintilla of credible, competent evidence, or, for that matter, evidence of any kind which controverted the testimony of these petitioners as to the purpose of their activities.

This purported finding of fact, which is only a conclusion, is merely the opinion of the court below that any time an employer loses business because of the nonunion status of his employees such employer is being coerced to interfere with his employees' rights to join or not to join a labor organization.

This theory of the Court must necessarily be based upon

the assumption that the employer is desirous of violating or will violate the law to escape the results of the legitimate activities of the organization. The Court has no right to indulge in such assumption.

In any event, the damages sustained by the employer are not caused by any illegal conduct to attain an illegal object. They are, therefore, damnum absque injuria, and the employer is no more entitled to an injunction than would be the flour manufacturers, who also are damaged by the reduction in the employer's business.

The employer cannot do for the employees what the employees cannot do themselves. Since it is clear that the employees are not entitled to an injunction, certainly the employer may not perform that service for them.

It must be noted that no place in the record is there any intimation that any force, threats, coercion or intimidation were exercised upon the company, the company's employees, or its customers. If, therefore, any of the customers of the nonunion employees refused to continue to patronize such employees, such refusal was attributable to a number of factors: (a) Sympathy with the union and its cause, and (b) a desire to retain the patronage of those who were sympathetic to the union and its cause.

The loss of patronage, therefore, was due only to peaceful persuasion and not because of any unlawful or illegal activities on the part of the defendants. Yet the court below emphasizes this loss of patronage as the result of peaceful persuasion, and refers to it as though it is the result which places the stamp of illegality upon the conduct of the petitioners.

(5) *Constitutional liberties may not be restrained by insubstantial or spurious findings of fact.*

Pertinent on this branch of the argument is the statement of this Court in the case of **Milk Wagon Drivers**

Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc., 312 U. S. 287:

> **"They (the state courts) must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court."**

This Court in that case also stated:

> **"Still it is of prime importance that no constitutional freedom, least of all the guaranties of the bill of rights, be defeated by insubstantial findings of fact screening reality."**

It is patently clear that any purported finding that the peaceful activities engaged in by petitioners are not directed to any legal proven objective is unsupported by the record. Any purported finding to such effect is truly a "spurious" finding and should not be credited by this Court.

III.

The Restraining Order Contained in the Judgment Prohibits and Restrains Petitioners From Exercising Rights Guaranteed by the Fourteenth Amendment to the Constitution of the United States, Is Improperly Directed to Activities Which Have Not Been Engaged in, Is Unnecessarily Broad and Comprehensive, and Is Indefinite, Vague and Uncertain, Requiring Petitioners to Act at Their Peril.

It is fundamental, of course, that injunctions are not issued unless there has been a course of illegal conduct and a reasonable expectation that such conduct will continue unless restrained. **Express Publishing Co. v. N. L. R. B.**, 312 U. S. 420.

It is also fundamental that such injunction, when issued, must be reasonably definite and certain so that those to

whom it is directed are fully aware what conduct is prohibited at the peril of contempt **(Restatement, Law of Torts**, Vol. IV, Para. 813-816).

(A) **Paragraph one of the injunction is not directed to any unlawful acts committed by petitioners.**

Bearing these principles in mind, we find that under paragraph 1 of the judgment petitioners are restrained from engaging in any course of conduct which is "reasonably calculated to coerce and intimidate respondent's employees." We have already pointed out that there is no basis for any finding that the peaceful activities of these petitioners are coercive or intimidatory. That provision of the injunction, therefore, is not directed to any existing unlawful act which may be reasonably anticipated to be continued in the future.

This particular provision of the injunction can be responsive only to the lower court's holding that the peaceful activities engaged in in the instant case are coercive or intimidatory. Since such finding of the Court is erroneous in fact and in law, the restraining order is similarly erroneous and cannot stand.

(B) **There is no basis in law for that part of the order which enjoins the following of trucks driven by respondents' employees.**

No finding was made by the Court that following of the trucks is unlawful or improper, unless it can be said that the violations of law on the part of the nonunion employees to escape being followed may be attributed to the petitioners.

The purpose of following the trucks is obvious. It is to enable picketing at the place and time when it is most effective, that is, at the point where the driver seeks to make his commission sales, and at a time when such driver is actually seeking to make such sale.

A firm such as the Carpenter Baking Company has hundreds of retail outlets in the City of Milwaukee. The union could have, had it wanted to, posted a picket in front of the most important of such outlets, advertising the nonunion status of the Carpenter employee making the delivery, and keep such picket posted there during the entire period that the store was open. Instead of adopting such method, however, the organization decided, for purposes of economy and efficiency, to advertise the facts only at such time as nonunion employees were actually seeking to make a sale or delivery.

The following of the truck, therefore, was not for the purpose of annoying, harassing or keeping under surveillance the activities of the nonunion driver, but merely to ascertain the next stop and to be present at the time such stop was made. The picket cars carried no signs or insignia of any kind. There was no indication, in so far as the public was concerned, that the truck driver was being followed. There was no attempt or effort on the part of those driving the picket cars to cause or compel any traffic violations.

There is testimony in the record that on occasions drivers who were followed sought to elude the pickets.

According to the testimony of Mr. McCully, one of the vice-presidents of the Carpenter Baking Company, there was no necessity that the drivers turn into alleys, but they could have gone ahead if they so desired (R. 82). Mr. McCully stated that he knew that the reason for trying to elude the following automobiles was to prevent the picketing in front of the store upon making the delivery (R. 82).

All that we have in the instant case, therefore, is a desire on the part of the nonunion employees to escape being so designated at the time of making their deliveries. In order to escape this designation they may have created

traffic hazards in very few instances. This certainly cannot be attributed to the union, nor can it be deemed an illegal or unlawful act of the union. One might as well argue that all activities of labor organizations must be enjoined if those against whom such activities are directed may foolishly engage in illegal or unlawful conduct for the purpose of escaping whatever burden such activities placed upon them.

If the activities of the petitioners were such that human life and property would be endangered; if this case involved reckless pursuit or persistent "dogging," which created on the part of the petitioners traffic hazards and dangers; or if we had here a case of abuse of the streets, then the Court might very well have enjoined such unlawful activities.

The record in the instant case shows, however, that from two to six automobiles were used in this activity, covering the entire area of the County of Milwaukee; that such automobiles always remained two or three car lengths behind the nonunion employees' truck; that no laws were violated by the following automobiles; that no damage was ever done.

It must also be noted here that there was no spirit of antagonism or animosity between the employees. The spirit of friendliness prevailed to such an extent that on occasions the nonunion employees and the representatives of the union would have lunch together or even engage in social calls during the evening (C. 60, 65, 86). There was, therefore, nothing malicious in the following of the truck. There was no persecution or the invasion of privacy. The nonunion driver may have, on occasion, sought to elude the follower so that he might succeed in making a delivery and sale before the customer was aware of his nonunion status, but certainly the union is not chargeable with any unlawful conduct voluntarily engaged in by the nonunion employee.

Under such circumstances it is preposterous to prohibit the union from adopting the one certain device which enables it to be present at a time when its statements to the public could be most effective in helping win its case.

The victim of an assault cannot be held guilty of the crime on the ground that the assailant's dislike for him was the cause of the crime.

Nor should the petitioners here be restrained in the legitimate and peaceful exercise of its rights because of the dissatisfaction of others with the result of the exercise of such rights. **Thornhill v. Alabama,** 310 U. S. 88.

(C) **Paragraph 3 of the restraining order is in flat violation of the constitutional rights of these petitioners.**

Paragraph 3 of the restraining order provides that the defendants and each of them, their officers, agents, servants and employees, be enjoined and restrained

> "(3) From inciting or attempting to persuade persons not to deal with the plaintiff or the plaintiff's employees or with retail dealers offering plaintiff's products for sale."

There is no limitation contained in this restraint on either the nature, the time, the place or the manner of the prohibited persuasion. It is all inclusive and embraces every possible and conceivable means available to the petitioners to present their views, their opinions and the facts relating to their controversy with the employees of the respondent, whether by placard, sign, newspaper, radio, or direct entreaty. It includes every normal and proper activity of labor organizations.

While this provision does not refer specifically to picketing or boycotting, it is obviously responsive to the findings which detail the activities engaged in by petitioners.

Under the **Thornhill, Carlson** and **Swing** cases, this provision constitutes a flat violation of the Fourteenth Amendment to the Constitution of the United States, regardless of whether such provision is based upon statute or otherwise. Any statute which purportedly will justify such provisions in a restraining order under the facts of this case would be clearly unconstitutional. **Thornhill v. Alabama**, supra. Any judgment of a court restraining such activities would clearly deny to petitioners rights, privileges and immunities afforded to them under the Fourteenth Amendment to the Constitution of the United States.

(D) **Paragraph 4 of the restraining order restrains petitioners from "(4) otherwise intentionally molesting, injuring or interfering with the plaintiff in its business." This is much too broad, indefinite and is responsive to no facts in the instant case.**

This paragraph apparently and obviously is designed as a general "catch-all" for the purpose of including within the scope of the injunction any activities which had not been specifically referred to in the previous provisions of the injunction.

Note, first, that there is nothing in the record which will sustain a finding of such intentional molestation, injuring or interfering, and note, secondly, that this paragraph, too, includes every possible and conceivable type of conduct which the ~~defendant organization~~ might engage in while pursuing their legitimate objectives. General language of this kind has been repeatedly criticized by the courts in labor as well as in nonlabor cases.

The use of the term "interference" has come before the courts in labor controversies before. In days of the broad, sweeping injunctions, which, unfortunately, are not yet en-

tirely things of the past, it was common to prohibit "interference in any way" or "unlawful interference," etc. Many appellate courts, in reviewing such injunctions, were quick to modify them.

In the case of **King v. Weiss and Lesh Manufacturing Company,** 266 Fed. 257, at 259, the Court modified an injunction containing the use of the words "all unlawful interference," because "it leaves the door open for controversy both as to what is 'interference' and what is 'unlawful interference.' "

For similar holdings see **Pierce v. Stablemen's Union,** 156 Cal. 70; **Michaels v. Herman,** 111 Misc. (N. Y.) 284, 286; **Wyckoff Amusement Company, Inc., v. Kaplan,** 183 App. Div. (N. Y.) 205, holding that injunctions using expressions such as "interference in any way" and "in any wise interfering" are too broad, indefinite, or too inclusive, to permit those against whom issued to be apprised of the particular conduct forbidden. **Bittner v. West Virginia-Pittsburgh Coal Company,** 15 Fed. (2d) 652; **Lisse v. Local Union,** 24 Pac. (2d) 833 (Calif.), affd. 41 P. (2d) 314; **Restatement of Law on Torts,** Volume 4, paragraph 816; **Grassi Contracting Co. v. Bennett,** 160 N. Y. Supp. 279; **American Federation of Labor v. Buck's Stove & Range Co.,** 33 App. D. C. 83; **Mills v. United States Printing Co.,** 91 N. Y. Supp. 185; **Gray v. Building Trades Council,** 97 N. W. 663, 1119 (Minn.); **Green v. Samuelson,** 178 A. 109.

In **Walton Lunch Co. v. Kearney,** 236 Mass. 3010, 128 N. E. 429, it was held that forms of interference with the plaintiff's rights, which are not found to have been practiced or threatened, are not rightfully included within terms of an injunction.

In **Robison v. Hotel & Restaurant Employees Local 782,** 207 Pac. 132 (Idaho), it was held that "there was no occasion to enjoin the use of force or violence, since none had

been used or was threatened. The injunction should not require the appellants to absolutely desist or refrain from in any manner interfering with the business of respondents. Neither should it include every species of expostulation or entreaty."

In **International Pocket Book Workers Union v. Orlove,** 158 Md. 496, 148 A. 826, it was stated that the injunction should be couched in language sufficiently definite to inform the strikers with reasonable clarity to what extent they could carry on picketing activities.

The entire question of the scope of the labor injunctions and their enforcement is discussed in the book **The Labor Injunction,** written by Felix Frankfurter (now Justice Frankfurter) and Nathan Greene, and published in 1930 by MacMillan Company. At pages 105 through 122, and in the footnotes thereto, there are given many and detailed examples of instances in which injunctions were modified by appellate courts and the particulars in which such injunctions were modified. After giving many examples and citing many cases the authors state:

> "Some courts have been alert to mitigate these difficulties. They began by ordering modification of decrees whose phrasing might cover lawful activities or purely hypothetical conduct. If by the term 'persuasion' duress is intended, duress and not persuasion should be restrained; if under cover of picketing, violence is used, violence, not picketing, should be enjoined. For, 'the vice of the injunctive order lies in the fact that this word, unqualified, may signify a lawful act.'"
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> "More recently, courts have felt the need of giving affirmative indications that their decrees were not means to paralyze all those activities which alone give validity to the abstract right to strike" (pp. 115-117).

There will be found in Volume IV of the **Restatement of**

the Law of Torts, paragraph 815, an excellent and concise statement of the rules to be followed in drafting an injunction. Pertinent herein is the comment at page 180, which reads as follows:

> "c. **Specificity of decree.** An injunctive decree in a labor dispute should inform the defendants as to the conduct which it prohibits. It cannot describe all the conduct in the most minute detail; but it should be as informative as practicable. Provisions restraining defendants from 'unlawfully interfering with' the conduct of the plaintiff's business, or from inducing 'by unlawful means' third persons not to deal with the plaintiff, or from 'resorting to any species of threats' against the plaintiff's customers, without specifying the things threatened, or from 'in any manner whatsoever impeding or interfering with' the conduct of the plaintiff's business, or from 'doing all unlawful acts described in the bill of complaint and the affidavits attached thereto,' do nothing more than command the defendants to obey the law and add nothing to the mandate by which the defendants are bound before the issuance of the decree. Such provisions are inappropriate in a labor injunction. **Workers cannot be expected to obtain from general commands a reasonably clear idea of specific acts which they are restrained from doing.**" (Emphasis ours.)

Note that the injunction in the instant case is clearly contrary to the **Restatement.** (See, also, the provisions of paragraph 816 of the Restatement.)

See, also, **Express Publishing Co. v. N. L. R. B.**, 312 U. S. 420.

Examination of the above authorities clearly demonstrates that the injunction herein is not only so broad as to include all conceivable exercises of constitutional rights, but is so indefinite and vague that the petitioners are not accurately or adequately advised as to what conduct is and

what conduct is not permissible. The injunction cannot stand under the cases already referred to. If permitted to stand, however, it must certainly be modified so as to at least have the attributes of definiteness and clarity, and must be limited to illegal acts reasonably anticipated to occur in the future.

IV.

The Injunction Entered Herein Cannot Be Justified on the Basis of Any Purported Violation of Section 343.681, Statutes 1939.

The complaint in the instant case alleged violation of Section 343.681 of the Wisconsin Statutes, making it a crime for two or more persons to combine together for the purpose of willfully or maliciously injuring another in his business by any means whatever.

Neither the decision of the Court, the findings of fact, nor the conclusions of law, assert a violation of this statute. Anticipating the possibility, however, that the application of this statute might be urged before this Court, we dismiss its applicability summarily.

Previously the same statute was discussed by this Court in the case of **Aikins v. Wisconsin,** 195 U. S. 154, at 158. In that case it was pointed out that the statute is applicable only where the intent of the activities is to cause malicious injury "* * * if for the sake of the harm as an end in itself and not merely as a means to some further end legitimately desired * * *." Similarly, it was held in the case of **Iron Moulders Union v. Allis-Chalmers** (Wis.), 166 Fed. 45, that a strike carried on by working men did not constitute a willful conspiracy within that section.

There can be no question in the instant case concerning the objective of the petitioners. There is no evidence, nor

is there a finding that the activities were carried on maliciously for the purpose of inflicting injury as an end in itself. Injury may have been sustained, but that was merely a result of lawful conduct directed to a lawful end, and, as stated in the case of **Senn v. Tile Layers' Protective Union**, 222 Wis. 383, "* * * the injury is incidental, injuria absque damno." See, also, the opinion of the United States Supreme Court affirming this case, 301 U. S. 468.

It is, therefore, respectfully submitted that section 343.681 has no application and no bearing upon the issues in this case.

CONCLUSION.

We have argued in the course of this brief many points, each of which standing alone, in our opinion, is sufficient to result in reversal of the lower court's decision. We shall not repeat those points here.

The basic issue can be stated simply in the following words: Have the petitioners in the instant case engaged in lawful activities directed to a legitimate purpose?

With respect to the means employed the decisions of the United States Supreme Court in the **Thornhill**, **Carlson** and **Swing** cases are conclusive upon such point. The means employed here constituted the exercise of the right of free speech under the Constitution of the United States.

The end sought by the unions under the uncontradicted testimony and findings of fact made by the court below is the unionization of those employees who have not yet joined the ~~defendant~~ union. The lawful means were directed solely and exclusively to this legitimate end. The union is seeking by lawful means to persuade the nonunion employees to join with their coemployees at their

own plant and at the rest of the major baking plants in the City of Milwaukee so that their organization may be made more effective.

As pointed out in the **Thornhill** and **Swing** cases the right of labor to disseminate information is not limited to certain types of controversies. Labor has the right to convey to the public information concerning the nonunion status of employees, regardless of whether such employees are nonunion because of their own volition or because they have been intimidated or coerced into refusing membership in such organization. In either event their nonunion status is of vital importance to the public and to the entire industry, as was correctly pointed out in the **Thornhill** case:

> "It is recognized now that satisfactory hours and wages and working conditions **in industry and a bargaining position which makes these possible** have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, **and the practices in a single factory may have economic repercussions upon a whole region** and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. **Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.**" (Emphasis ours.)

The injunction issued by the court below, reduced to its simplest terms, prevents such lawful activity for a legitimate end. It cannot be sustained on any ground.

It is, therefore, respectfully submitted that the judg-

ment appealed from be reversed, so that these petitioners may be permitted to exercise such rights which are assured to them by the Constitution of the State of Wisconsin and the Constitution of the United States, without fear of restraint and punishment.

Respectfully submitted,

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